No. 245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,
Petitioners,

vs.

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2004-2025) is reported in 187 F. 2d 860. The opinion of the United States District Court for the District of Hawaii (R. 366-520) is reported in 82 F. Supp. 65.

JURISDICTION

This petition involves two cases[1] in which judgments were entered by the Court of Appeals[2] on February 28, 1951 (R. 2025-2026, 2027-2028). Rehearing was denied on May 25, 1951 (R. 2028). Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The District Court enjoined four pending territorial criminal proceedings upon the ground that it found invalid the criminal statutes involved and the manner of selecting the grand jury. The Court of Appeals reversed the decrees and directed the dismissal of the suits. The question presented is:

> Did the Court of Appeals err in holding that the injunctions must be denied because of two basic circumstances i.e. that only pending territorial criminal proceedings are involved and the defendants therein have full opportunity to test the criminal statutes and the grand jury's composition in those criminal proceedings and upon appeal therefrom.

This question is argued in Point 1, infra. Further questions, which respondents believe will not be reached, are presented and argued briefly in Points 2 and 3.

STATEMENT

(1) Petitioners' Statement does not conform to this Court's requirements and should be disregarded.

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[1] The two cases were consolidated (R. 348, 565, 1135). Unless otherwise indicated, references to the record are to the record in No. 12,300 in the Court of Appeals, or to the consolidated record in Nos. 12,300-12,301, the paging of which follows consecutively the paging in volume I of the record in No. 12,300. Where the reference is to volume I of the record in No. 12,301 (a volume of 101 pages which for that case precedes the consolidated record) the reference used is as follows: "No. 12,301, R. ....."

[2] The District Court had erroneously convened a three judge court (R. 100-103; No. 12,301, R. 49-52); in this circumstance an appeal lay to the Court of Appeals, rather than to this Court. *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 380-381 (1949).

In their Summary Statement of Matter Involved (Pet. 2-17) petitioners violate the rules of this Court[3] to such an extent that their Statement should be disregarded. Petitioners reject and restate portions of the trial court's findings that the court below accepted.[4] As to other findings, petitioners (without references to the record) commingle the facts found with their own additions. That the additions were not found by either court can be perceived only through a page by page comparison.[5] In both situations "appropriate page references to the printed record" are missing, and there are instances where nothing in the record could be cited.[6] In both situations petitioners fail to show, either here or elsewhere in their brief, wherein there are open to them the factual questions which they seek to inject by these restatements and additions. Since petitioners were appellees below and did not cross-appeal,

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[3] Rule 27, paragraphs 2(d) and 3.

[4] There is a complete restatement of the findings as to the three incidents which occasioned the four pending territorial criminal proceedings (Pet. 8-12). These findings were the same in the trial court and the court below (R. 2006-2009).

[5] For example:

Pet. 6, lines 9-10, states petitioners showed they were singled out "for harsher treatment than other persons in the community for like offenses." Like offenses of other persons is the matter that the Court of Appeals held was missing from one of the trial court's findings and essential to give that finding significance (R. 2017). Petitioners do not cite the record. As the Court of Appeals held (R. 2017), the record contains no proof of like offenses of other persons.

Pet. 7, line 29 to Pet. 8, line 2, concerns an incident on Oahu, in the City and County of Honolulu, having a different prosecutor than the County of Maui where the incidents here involved occurred. Despite respondents' objections (R. 1218-1220, 1566-1567) to the admissibility of evidence of this Oahu incident the District Court admitted it (R. 409, note 45), but did not find the persons involved were held "purportedly for violations of the unlawful assembly and riot act," which petitioners now assert they showed; the District Court found only that the charges were "obstructing a highway" (R. 409). The unlawful assembly and riot act, which the petitioners inject by their statement, is the statute involved in these cases. The offense of obstructing the highway (Sec. 11103, Revised Laws of Hawaii 1945) is not involved.

[6] See Note 5, supra.

obviously the factual questions are limited, and even if these restatements and additions were properly supported by record citations, the materiality thereof would have to be shown for this Court to consider them.

(2) Statement of the case.

These are suits brought by defendants in four criminal proceedings pending in the Circuit Court of the Territory of Hawaii, to enjoin their prosecution. Additional parties were the International Longshoremen's and Warehousemen's Union (ILWU) and members of the union alleging class representation. (R. 3-4, 9-10, 104-105; No. 12,301, R. 4-5, 12-13.) Plaintiffs are petitioners here. The respondents here are the Attorney General of Hawaii, in both cases, and the Chief of Police of the County of Maui, in one of the cases.

The four territorial criminal proceedings are docketed in the Circuit Court of the Second Circuit, County of Maui, as Criminal No. 2365 (No. 12,301, R. 28-34), Criminal No. 2412 (R. 88-93), Criminal No. 2413 (R. 93-99), and Criminal No. 2419 (R. 138-323). These four proceedings grew out of three incidents occurring in said county. The facts as to the three incidents were found by the District Court,[7] and such findings were accepted by the Court of Appeals and incorporated in its opinion as follows:

> "The criminal charges grew out of certain disorders which occurred during separate strikes by sugar-workers, and pineapple workers, members of the ILWU union." (R. 2006.)

The 1946 Paia incident, involved in Criminal No. 2365 and Cause No. 12,301.

"On the morning of October 16, 1946, during the

[7] R. 391-395 as to the 1946 Paia incident; R. 402-406 as to the first 1947 Lanai incident; R. 408 as to the second 1947 Lanai incident.

sugarworkers strike, some three to four hundred members of that group were in a picket line, four columns deep, before the entrance to the sugar mill of Maui Agricultural Company at Paia, on the Island of Maui. Five workmen employed in the mill appeared for the purpose of crossing the picket line and going to work. The same men had attempted to pass through to work the previous day, but had been prevented because the pickets stood shoulder to shoulder. On the 16th a number of police were on hand.[1] [Note 1: "The opinion of the district court states that at this time 'After certain preliminary conversations between members of the ILWU, Kealoha, Joseph Kaholokula, and others respecting the entry of the five workmen to the mill it was stated by Kaholokula that if the five men tried to cross the picket line, "police or no police," there would be violence and bloodshed.' (82 F. Supp. 65, 79.) "] As the mill whistle blew the five men, escorted by the police, started toward the mill entrance. Two hundred of the pickets converged on the five men and pushed them back. Upon a second attempt to pass the five workmen and the police were pushed back 10 or 12 feet farther. This ended the attempts to enter the mill. There is no finding that any blows were struck." (R. 2006-2007.)

The two 1947 Lanai incidents, involved in Criminal Nos. 2412, 2413, and 2419 and Cause No. 12,300.

"The other three criminal proceedings grew out of incidents later occurring in connection with the pineapple workers strike, on the Island of Lanai, also in the County of Maui. On July 14, 1947, as several supervisory employees of the Hawaiian Pineapple Company, not members of the union, were about to load upon a barge some pineapples picked before the strike and then in bins upon the wharf, about 300 union pickets led by union 'picket policemen' ran toward the men on the wharf, yelling 'at the tops of their voices,' caught and beat one of the men, chased and 'punched at' another, forcing him and another man to jump into the water to escape, broke open the bins and

threw pineapples at the barge and tug and at the men in the water." (R. 2008.)

"On the day following the incident at the wharf, 20 to 25 persons headed by 'union police' with arm bands, went to the rooms of two non-striking truck drivers employed by the Hawaiian Pineapple Company on the Island of Lanai, and administered 'a severe beating' to both of them." (R. 2008.)

Three of the criminal proceedings involve the offense of riot, and the other, Criminal No. 2365, riot and conspiracy. (R. 88-93, 93-99, 138-323; No. 12,301, R. 28-34; R. 2006.) In both federal suits petitioners attacked the statute setting forth the offense of riot, and in the suit involving Criminal No. 2365 the conspiracy statute as well.[8] They also attacked the manner in which the grand jury was selected.[9]

The District Court held invalid the criminal statutes (R. 439-467) and the composition of the grand jury list (R. 486-512). It justified equitable relief by what it thought was "exceptional circumstances" (R. 467-486). By its decree in No. 12,300 the District Court enjoined three of the pending territorial criminal proceedings,[10] and by its decree in No. 12,301 enjoined the other pending proceeding.[11] The decrees contained no other injunctive relief.

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[8] R. 11-14; No. 12,301, R. 13-15. The statutes are printed in the appendix of petitioners' brief, pp. 53-60.

[9] The attack on the grand jury is reviewed in the argument, infra, pp. 19-20.

[10] Criminal Nos. 2412, 2413, and 2419. No. 12,300 was the suit filed in the District Court on December 1, 1947 as Civil No. 828 (R. 2-26). In the decree in that case the criminal proceedings appear as "the prosecution commenced July 15, 1947" (R. 549), "the prosecution commenced July 16, 1947" (R. 548), and "the prosecution commenced August 1, 1947" (R. 549).

[11] Criminal No. 2365. No. 12,301 was the suit filed in the District Court on December 31, 1947 as Civil No. 836 (No. 12 301, R. 2-35). In the decree in that case the criminal proceeding appears as "the prosecution commenced in October, 1946" (No. 12,301, R. 95).

The Court of Appeals did not reach any issue as to the validity of the criminal statutes or the composition of the grand jury. The court held there were no "exceptional circumstances" (R. 2010-2018). As to the portion of the District Court's opinion[12] in which it held that the statutes were a cloud on labor relations and that this constituted an "exceptional circumstance" under *A.F.L. v. Watson*,[13] the court said:

> "We are unable to perceive any resemblance between the facts here and those in A.F.L. v. Watson, supra• • • •
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> Here there is no showing of any attempted collective bargaining, or other legitimate union activity with which any act here charged to the defendants could possibly interfere• • • •" (R. 2012.)

As to the portion of the trial court's opinion[14] in which it found bad motives of the prosecutor, characterized such motives as want of good faith, and held that this constituted an "exceptional circumstance" under *Douglas v. Jeannette*,[15] the court below held that, to be relevant, lack of good faith should be such as to affect the opportunity of the applicants for injunction to test their rights in criminal cases, that a defendant in a criminal case could not, by alleging that the prosecutor's motives were bad and the criminal statute invalid, move into a court of equity and have those issues tried there. (R. 2014-2016.) The court further held "want of good faith was not proven, and the court's finding in that respect clearly erroneous" (R. 2017).

The Court of Appeals found the cases controlled by the basic circumstances that only pending criminal proceedings are involved (R. 2019-2021), and that petitioners have full opportunity to test the constitutional issues in the four

[12] R. 439, 474-479, reviewed by the court below at R. 2011-2014.
[13] 327 U.S. 582.
[14] R. 480-482, reviewed by the court below at R. 2014-2018.
[15] 319 U.S. 157.

pending criminal proceedings and upon appeal therefrom. (R. 2021-2022.) It noted that respondents had moved to dismiss the complaints for lack of showing of an appropriate case for equitable relief (R. 2020). It held that the rules expressed in its own decisions[16] and the decisions of this Court[17] "required the district court to deny the injunctions prayed for" (R. 2018-2025). The court directed entry of judgment of dismissal in each case. (R. 2003, 2025-2026, 2027-2028.)

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE THIRD OR SIXTH CIRCUITS, AND IT PROPERLY APPLIES THE DECISIONS OF THIS COURT.

A. The substance of the petition.

The petition seeks to present, through federal equity suits, constitutional issues presentable in and upon appeal from the pending territorial criminal proceedings. This is said to be the effect of 8 U.S.C. 43 (Br. 24-26). But this Court always has, notwithstanding the citation by a pleader of this section, determined whether the subject matter of the particular suit was appropriate for equitable relief.[18] Fundamental to the showing of an appropriate case for federal equitable relief is the production of adequate reasons why the plaintiff should not defend in state criminal proceedings. This rule, in all its aspects here involved, was fully considered and properly applied by the court below.

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[16] *Babcock v. Noh*, 99 F. 2d 738, 739 (C.A. 9th 1938) (R. 2018-2019, 2021, 2025); *Alesna v. Rice*, 172 F. 2d 176, 177 (C.A. 9th 1949) cert. denied 338 U.S. 814 (R. 2021, 2023, 2025).

[17] *Ex parte Young*, 209 U.S. 123, 162 (1908) (R. 2020); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-453 (1927) (R. 2021).

[18] *Giles v. Harris*, 189 U.S. 475, 486 (1903); *Williams v. Miller*, 317 U.S. 599 (1942), aff'g per curiam 48 F. Supp. 277; *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *Stainback v. Mo Hock Ke Lok Po, supra*, 336 U.S. 368 (1949).

By reducing the opinion of the Court of Appeals to two quotations of one sentence each lifted out of context (Pet. 16-17), petitioners attempt to create the appearance of a case for certiorari. In the context the court held that no case for the exercise of equity jurisdiction was presented when, first, "there is no proof or finding that for exercising lawful rights plaintiffs are threatened with future prosecutions under the statutes they assail," and when, second, "in the four pending actions, the plaintiffs have at hand full opportunity to test their rights by defending in those proceedings." It was of this class of cases, defined and circumscribed by the court by the listing of these two "basic" circumstances, that the Court of Appeals said "No extraordinary circumstances will serve to create such [equity] jurisdiction." (R. 2021-2022.) And it was of the theory that a defendant in a criminal case can move into a court of equity for his attack on the criminal statute if he also attacks the prosecutor's motives that the Court of Appeals said "No case has been called to our attention which has applied the trial court's theory* * * *" (R. 2014-2015.)

B. The third and sixth circuit decisions cited by petitioner present no basis for certiorari.

The granting of certiorari in *Stefanelli v. Minard*[19] (Pet. 19, Br. 29) does not sustain this petition. That was a case of an unreasonable search and seizure in a state having no rule of evidence to implement the protection of the Fourteenth Amendment. Hence the validity of the search and seizure could not be made an issue in the state criminal proceeding or upon appeal therefrom, as held in *Wolf v. Colorado*.[20] The *Stefanelli* case begins with, and takes its importance from, the basic assumption that the constitu-

[19] 184 F. 2d 575 (C.A. 3d 1950) cert. granted May 14, 1951, No. 2 October 1951 Term.

[20] 338 U.S. 25 (1949).

tional issue cannot be asserted in the state criminal proceeding.[21] No such case is presented here.[22]

Petitioners assert a conflict between the decision below and the third circuit in the rule as to equitable intervention in pending state criminal cases. Both circuits hold that, when there is an opportunity to test rights by defending in the pending criminal proceedings, that opportunity must be exhausted.[23] There is no conflict. Whether, in the

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[21] The petition in the *Stefanelli* case (No. 2, p. 9) quoted from the *Wolf* case to show that this Court recognized the basic constitutional right and left open the question of remedy, holding only that the rule of evidence followed by the State was one which it was competent for it to adopt.

[22] Of course the territorial proceedings are governed by the same constitutional provisions that govern in a federal court. *Territory v. Yoshimura,* 35 Haw. 324, 330; *Duncan v. Kahanamoku,* 327 U.S. 304 (1946); *Territory v. Kataoka,* 28 Haw. 173, 176. The procedure for attacking a criminal statute is not in question. See *Territory v. Kaholokula,* 37 Haw. 625. The procedure for attacking a grand jury is by challenge to the grand jury, or by motion to quash the indictment or plea in abatement. See the argument on the grand jury, p. 19, infra.

[23] In the *Stefanelli* case the third circuit said:

"Every question here raised by the appellants can be asserted by them in the New Jersey State Courts and the way to the Supreme Court of the United States lies open. Federal courts should not enjoin criminal proceedings in state courts save in exceptional cases to prevent irreparable injury which is clear and imminent. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324."

Stefanelli v. Minard, supra, 184 F. 2d 575, 576 (C.A. 3d 1950).

The ninth circuit cases say:

"The constitutional question said to be for determination by the Federal court is one which the state court is competent to deal with in the criminal action pending before it. Its decision of the Federal question is subject to ultimate review in the Supreme Court of the United States. An adequate legal remedy is thus available. Fenner v. Boykin, supra (271 U.S. 240). There is plainly no warrant for equitable interference with the proceedings in the state tribunal, • • •"

Babcock v. Noh, 99 F. 2d 738, 740 (C.A. 9th 1938.)

"• • • in the four pending actions, the plaintiffs have at hand full opportunity to test their rights by defending in those proceedings. As this court said in Alesna v. Rice, 172 F. 2d 176, 177, 'Had the prosecution of the information proceeded, the jury might have ac-

light of *Wolf v. Colorado, Stefanelli* was a case for application of this rule is immaterial here.

In asserting a conflict with the third circuit petitioners cite *Cooper v. Hutchinson*[24] (Pet. 19, Br. 25, 27-28) as well as the later *Stefanelli* case. They note (Br. 28) that in the *Cooper* case the court only required the exhaustion of an interlocutory appeal to the state supreme court, whereas here some of the petitioners had taken an interlocutory appeal to the territorial supreme court which had upheld the constitutionality of the unlawful assembly and riot act.[25] The *Cooper* case was argued May 24, 1950 and decided July 21, 1950. Only a short time before, on April 3, 1950, this Court had decided *Darr v. Burford.*[26] *Darr* was not cited in the *Cooper* case, and there is nothing to show that the third circuit knew of it or considered it until the habeas corpus case of *United States v. Warden,* decided January 26, 1951, in which the third circuit said: "We entertain no doubt since Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, comparing Wade v. Mayo, 334 U.S. 672, 68 S.Ct. 1270, 92 L.Ed. 1647, with Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572, that in order to exhaust state remedies application for certiorari must be made to the Supreme Court."[27] *Stefanelli* shows that since *Darr* the third circuit, in equity cases as well, requires the ex-

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quitted the defendants, appellants, and the constitutional and other questions avoided. In any event, the appellants had a speedy and sufficient remedy at law by appeal to the Hawaiian Supreme Court, where the appellants' arguments of the two contentions may have prevailed. Losing, there is the appeal here. In both appellate courts the practice gives primacy of consideration to criminal appeals.' (R. 2021-2022.)

"• • • the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong." (R. 2022)

[24] 184 F. 2d 119 (C.A. 3d 1950).

[25] *Territory v. Kaholokula,* 37 Haw. 625 (1947).

[26] 339 U.S. 200.

[27] 187 F. 2d 615, 618.

haustion of remedies all the way to this Court.[28]

Although *Cooper* mentioned that section 2283 of Title 28 would not curb the court's power,[29] this presents no conflict because the court below did not reach that question as it specifically said (R. 2024). In an attempt to meet this absence of conflict petitioners argue (Br. 27-28) that section 2283 should have been reached by the court below, but this is on the completely erroneous assumption that there are no judicial rules limiting the enjoining of criminal proceedings, that only the statute stays the hand of the chancellor.

The sixth circuit decision in *McShane v. Moldovan*,[30] on which petitioners also rely (Pet. 19-20, Br. 31), is a damage suit in which no interruption of a state criminal proceeding was involved.

C. The court below properly applied the decisions of this Court.

The petition asserts conflict of the decision below with *Hague v. C.I.O.*,[31] *Douglas v. Jeannette*,[32] *American Federation of Labor v. Watson*,[33] *Screws v. United States*,[34] and *United States v. Classic*[35] (Pet. 16, 19),

Petitioners seek to uphold the portion of the trial court's opinion in which it relied on *Douglas v. Jeannette* for an "exceptional circumstance." The argument is based on the words "No person is immune from prosecution in good faith for his alleged criminal acts" appearing in the *Jeannette* case. (Br. 30, 33.) But there the quoted sentence is immediately followed by the explanation: "Its imminence, even though alleged to be in violation of constitutional guar-

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[28] Note 23, supra.
[29] 184 F. 2d at p. 124.
[30] Miscited as 179 F. 2d 425 (Pet. 19-20). Apparently 172 F. 2d 1016 is intended.
[31] 307 U.S. 496 (1939).
[32] 319 U.S. 157 (1943).
[33] 327 U.S. 582 (1946).
[34] 325 U.S. 91 (1945).
[35] 313 U.S. 299 (1941).

anties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."[36] As the Court of Appeals noted (R. 2016) the phrase "prosecution in good faith" was used in the *Jeannette* case in contradistinction to situations such as in *Hague v. C.I.O.*, cited and distinguished in the *Jeannette* case,[37] where the plaintiffs could not hold peaceful meetings because of a deliberate policy of breaking up such meetings and deporting those arrested, so that such interference could not be met by defending in criminal proceedings, which were a sham. This Court never has held that a defendant having full opportunity to test the criminal statute in a pending criminal proceeding could move into a federal equity court for his attack on the criminal statute by also attacking the prosecutor's motives.[38] The *Hague* and *Jeannette* cases involved no such situation.[39]

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[36] 319 U.S. at p. 163.

[37] 319 U.S. at p. 164.

[38] The court below (R. 2015, note 7) noted three cases in which the defendant attacked the good faith of the prosecutor but was not allowed to move into the federal court. These were cited for comparison, being removal and habeas corpus cases, i.e. *Kentucky v. Powers*, 201 U.S. 1; *Mooney v. Holohan*, 294 U.S. 103; and *Ex parte Hawk*, 321 U.S. 114, 116.

[39] Both cases involved injunctions sought to protect the continuance of the exercise of lawful rights against threatened future interference therewith. Neither involved the seeking of an injunction against pending criminal proceedings. The terms of the decree in the *Hague* case speak for themselves; the decree prohibited interference with the holding of public meetings and distribution of literature and, second, required prompt production before a judicial officer of any persons arrested. In the *Jeannette* case the right to distribute religious literature was involved but the injunction was denied because not necessary for the protection of petitioners' rights. Petitioners were not the individuals already arrested and prosecuted in the state courts. Although appeals from such state prosecutions were pending (130 F. 2d 652, 655), no injunctive relief against the pending state proceedings was sought, as appears from the companion case of *Reid v. Brookville*, 39 F. Supp. 30, 32, cited as parallel on the facts in the trial court's decision in the *Jeannette* case, 39 F. Supp. 32, 33.

Screws v. United States[40] (Br. 30, 32) was a prosecution of officers who beat a prisoner to death, in which this Court distinguished "procedure which wrests from state courts the power to try offenses against their own laws."[41] *United States v. Classic*[42] (Br. 31), a criminal prosecution for violation by state officers of the rights of electors, has no bearing.

Petitioners further seek to uphold the portion of the trial court's opinion in which it relied on *A.F.L. v. Watson*[43] for an "exceptional circumstance." Petitioners are faced with the necessity of meeting the holding of the Court of Appeals that:

> "We are unable to perceive any resemblance between the facts here and those in A.F.L. v. Watson, supra. There it appeared that the plaintiff labor unions were engaged in negotiating closed shop agreements, as they asserted they had the right to do by virtue of the National Labor Relations Act,* * * *
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> "Here there is no showing of any attempted collective bargaining, or other legitimate union activity with which any act here charged to the defendants could possibly interfere. The evidence shows, on the contrary, that the activities in which the plaintiffs were engaged at the time of the occurrence out of which the criminal prosecutions arose had nothing to do with any right granted by the Labor Management Relations Act, 1947, the Civil Rights Act [citing sections] or Amendments I, V, VI, XIV and XIX to the Constitution, upon which plaintiffs' rights are alleged to be founded. The activities and conduct of the plaintiffs here (characterized by the trial court as the 'illegal conduct of the strikers') involved the sort of conduct 'policing of [which] is left wholly to the States. . . . No one questions the State's power to police coercion by those methods.' *International Union, U.A.W. v. Wisconsin Board,* 336 U.S. 245, 253." (R. 2012-2013.)

[40] 325 U.S. 91.
[41] 325 U.S. at pp. 111-112.
[42] 313 U.S. 299.
[43] 327 U.S. 582.

Petitioners do not meet this holding. Instead, under the heading "Deprivation of Constitutional Rights," they deprecate the seriousness of the incidents involved (Br. 45).

The court below made the correct application of the rule, repeatedly laid down by this Court,[44] that mere allegations of unconstitutionality of a statute are not enough; the applicant for injunction must show threats of interference and such threatened interference must infringe upon the enjoyment of some property right or personal right. The court below reviewed the record (R. 2019-2020), noted that the injunctions issued by the trial court related solely to the prosecutions then pending (R. 2019 at note 9), that there were no allegations to support an injunction against future proceedings (R. 2019-2020), and that there was no finding that future prosecutions were threatened (R. 2020), and then summed up:

> "There is no proof or finding that for exercising lawful rights plaintiffs are threatened with future prosecutions under the statutes they assail." (R. 2021.)

Since only the four pending territorial criminal proceedings are involved in these suits, and by defense therein and on appeal therefrom the statutes and grand jury composition can be tested, the Court of Appeals manifestly was correct in ordering the dismissal of the suits on the authority of its own earlier decisions[45] and the decisions of this

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[44] In addition to the *Hague, Jeannette,* and *A.F.L.* cases, see *Watson v. Buck,* 313 U.S. 387, 400 (1941), injunction proceedings; *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 99 (1949), injunction proceedings; *National Maritime Union v. Herzog,* 78 F. Supp. 146, 154, aff'd 334 U.S. 854 (1948), injunction proceedings; *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91 (1947), declaratory judgment and injunction proceedings; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 324 (1936), declaratory judgment and injunction proceedings.

[45] *Babcock v. Noh,* 99 F. 2d 738, 739 (C.A. 9th 1938), cited and explained at R. 2018-2019, 2021, 2025; *Alesna v. Rice,* 172 F. 2d 176, 177 (1949), cert. denied 338 U.S. 814, cited and explained at R. 2021, 2023, 2025.

Court.[46] While the decisions of this Court relate to state criminal proceedings it is now well settled, as the court below held and the petition does not deny, that "the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts." (R. 2024.)[47]

2. THE REVERSAL BY THE COURT BELOW OF THE DISTRICT COURT'S FINDING OF LACK OF GOOD FAITH WAS CORRECT.

If, by attacking the good faith of the prosecution, petitioners could move from the criminal court into the equity court for their attack on the criminal statutes and grand jury, they next would have to restore the finding of lack of good faith.

The Court of Appeals was specific in its reasons for reversing the finding. The court said:

> "The principal ground of bad faith is said to be that 'no one has been prosecuted under the unlawful assembly and riot act except in connection with labor disputes.' But unless riots did occur at places and under circumstances not involving labor disputes which called for complaints which the prosecutor refused or neglected to file, the quoted statement has no significance. It is not claimed, and there was no allegation or proof that there were any such unprosecuted violations. The remainder of the circumstances listed by the court's opinion as evidence of bad faith, it seems to us, are no

[46] *Ex parte Young*, 209 U.S. 123, 162 (1908) cited at R. 2020; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452-453 (1927) cited at R. 2021; *Fenner v. Boykin*, 271 U.S. 240, 243 (1926) cited at R. 2023. See also *Broad-Grace Arcade Corp. v. Bright*, 284 U.S. 588, aff'g 48 F. 2d 348.

[47] The Court of Appeals found this principle established by its earlier decisions in *Alesna v. Rice, supra*, 172 F. 2d at p. 179; *Wilder's S.S. Co. v. Hind*, 108 Fed. 113, 115, 116, aff'd 183 U.S. 545; and *Yeung v. Territory of Hawaii*, 132 F. 2d 374, 378; and by this Court's holding, in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949) that in respect of the propriety of federal injunctive interference territorial courts resemble state courts.

> more than expression of the trial court's opinion that the prosecution was too vigorous, or that the police officers rather than the prosecuting attorney, should have selected the statute under which complaint would be filed, or that the methods used in securing evidence were poor."
>
> (R. 2017, and note 8, R. 2017-2018.)

Petitioners do not meet this by their undocumented statement that the finding was "on the basis of the whole record" (Br. 48). Even as to the principal ground of the finding, they make no attempt to show by the record that they did prove the fact missing from the finding and which the court below said was not proven i.e. like offenses of other persons.[48]

3. THE DISTRICT COURT ERRED IN INVALIDATING THE CRIMINAL STATUTES AND THE GRAND JURY.

The District Court not only erred in reaching the constitutional issues but also erred in its treatment of those issues.

A. The District Court erred in invalidating the unlawful assembly and riot act.

The Unlawful Assembly and Riot Act[49] was construed by the Supreme Court of Hawaii in the Kaholokula case.[50] The Supreme Court held that the statute was derived from the common law, that the phrase "striking terror or tending to strike terror," used throughout the statute, took its meaning from the common law, and that "acts which strike or tend to strike terror into others are essential ingredients

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[48] See p. 3, note 5, where respondents have called attention to the inclusion in petitioners' statement of facts not found by either court and not supported by record citations.

[49] Chapter 277, Revised Laws of Hawaii 1945, printed in the appendix of the petition (pp. 53-57).

[50] 37 Haw. 625 (1947).

of the offense." This construction was authoritative,[51] and the Hawaii court was correct in its holding that a statute may take its meaning from the common law.[52] Nevertheless the trial court construed the statute for itself and struck it down on the basis of its own construction (R. 444-460). Disregarding the meaning given by the common law to the phrase "in terrorem populi" employed throughout the statute and there expressed in the words "striking terror, or tending to strike terror into others," the trial court held that these words did not contemplate the reasonable man test and were "purely subjective" (R. 453). The court thus excised the words that confined the statute to a clear and present danger of breach of the peace and assured its constitutionality.[53] None of the cases in point is cited by petitioners (Br. 35-39).

B. The District Court erred in invalidating the conspiracy statute.

For present purposes it is sufficient to point out that this case involves more than one portion of the conspiracy statute.[54] Among the provisions involved is one defining a conspiracy as a "mutual undertaking * * * to commit any offense."[55] No reason was assigned for invalidating this por-

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[51] *A.F.L. v. Watson*, 327 U.S. 582, 598 (1946); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949); *Shipman v. DuPre*, 339 U.S. 321 (1950); *Winters v. New York*, 333 U.S. 507, 514 (1948); *Musser v. Utah*, 333 U.S. 95, 98 (1948).

[52] *Nash v. United States*, 229 U.S. 373, 376, as construed in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

[53] *Cole v. Arkansas*, 338 U.S. 345; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573; *Cantwell v. Connecticut*, 310 U.S. 296, 308; *Feiner v. New York*, 340 U.S. 315, 319.

[54] Chapter 243 of the Revised Laws of Hawaii 1945, printed in the appendix of the petition (pp. 53-57).

[55] That this was involved appears at R. 401 where the trial court describes the second count of the indictment in Criminal No. 2365, Cause No. 12,301, R. 32-34, as "conspiracy to commit a felony, third degree." Correctly, conspiracy to commit a misdemeanor, i.e. assault and battery, was involved.

tion of the statute (R. 461-467). Its severability was not considered by the trial court; it clearly was severable.[56]

C. The District Court erred in invalidating the 1947 grand jury.

Petitioners state with respect to their attack on the composition of the grand jury[57] that "Petitioners have done all they can to get relief under territorial law. . . ." (Br. 28.) This is not correct. The parties in No. 12,300 challenged the grand jury in the territorial circuit court; after an extensive hearing the court denied the challenges (see R. 59-87, 567-1082). Instead of appealing, these persons went into federal court and secured a temporary restraining order which prevented the grand jury from acting before it went out of office, thus deliberately mooting the grand jury issue as to them (R. 1085-1096). The mootness was recognized by the District Court, as its decree in No. 12,300 is silent with respect to the composition of the grand jury (R. 543). The parties in No. 12,301, who were indicted in Criminal No. 2365 on December 2, 1947, have not attacked the grand jury in the territorial court although they could do so by plea in abatement or by motion to quash the indictment.[58] Hence, the grand jury issue again boils down to an attempt by the defendants under indictment in Criminal No. 2365 to proceed in a federal equity court in lieu of proceeding in the territorial court where this constitutional issue could be presented.

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[56] *Territory v. Tam,* 36 Haw. 32, 51; *Stromberg v. California,* 283 U.S. 359, 367-368.

[57] Petitioners did not attack the validity of the grand jury statutes, but only their administration.

[58] *Territory v. Braly,* 29 Haw. 7. That this practice is of long standing in the Territory of Hawaii appears from *Kaizo v. Henry,* 211 U.S. 146 (1908), where a plea in abatement was used. Hawaii being a territory, this Court's holding as to remedies in *Carter v. Texas,* 177 U.S. 442, necessarily applies.

Moreover, petitioners try to make a negro-exclusion-type case out of the absence of Filipinos from the grand jury list of 50 (there were no Koreans, full-blooded Hawaiians, or Puerto Ricans either), although the Territory is a racial melting pot, and petitioners concede there were 7 Japanese, 4 Chinese and 12 part-Hawaiians or 23 non-Caucasians, on the list (R. 1942-1943). In addition, the eligible Filipino group in Maui County is both recent and minute.[59]

Petitioners also claim they "showed exclusion of wage earners under the test laid down in *Thiel v. Southern Pacific Co.*, 328 U.S. 217" (Br. 42). However, the District Court found there were 6 laboring men named on the grand jury list (R. 501). Thus, petitioners are really trying to establish a new rule of proportionate representation according to occupation. Moreover, the District Court's treatment is so artificial that the court classified in its employer-entrepreneur group (R. 500) three out of six ILWU men on the list.[60]

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[59] Cf *Moore v. New York*, 333 U.S. 565, 568 (1948).

[60] Union men Ito (R. 729), Saka (R. 731) and Muroki (R. 1037) must have been placed in the District Court's employer-enterpreneur group, inasmuch as they are not among the 6 persons listed by petitioners as daily wage earners (R. 1439), which list tallies with the court's findings of 6 laborers (R. 501).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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